

REVISED BY

John Herne Esq;

Care of the Honourable Society

G. P.

LINCOLNS INNE

The Statute of 25 H. 8. Cap. 3.

CONCERNING

COMMISSIONS

OF

SEWERS.

Translated out of the French Manuscript.

LONDON,

Printed for Marlow-Walkers, at Church-lane-Gate
in Holborn, 1677.



LOWDOWN

Printed for James Lowdown at the
in 1762



TO THE
RIGHT HONORABLE,
AND
RIGHT WORSHIPFUL,
THE
COMMISSIONERS
OF
~~S E V V E R S~~
FOR

The City of *Westminster*, and parts
neare adjacent.

Here present you with a Reading, the Author whereof may be known to most of you; it is not for me to write Eulogiums on his worth; for his eminency in other learning, besides his great knowledge that appears in this, speaks him more to the judicious and intelligent then I dare take upon me to express, lest I do too little, knowing my inability of doing him honor enough:

I hum-

I humbly beg your pardon in obtruding so rude a
Composure, (as to the translation) upon your Pa-
tronage, the sense of my own weakness, making me
conscious of some mishaps, but reflecting upon the
greatness of your judgements and learning in this Law,
together with your candor to my years, will first recti-
fie and then pardon: Let the world shoot their bolts, I
have my end if in this or any other act I may be esteem-
ed

Your humble Servant,



The



TO THE
READER

Reader,

I Can neither find nor learn that ever
any but Serjeant Callis ever writ up
on this Statute, therefore this is the ra-
rer. I have that reverence both to the
Author and his work, that I professe to
my best knowledge I have not wrong'd
him in the translation, but what the smal-
lest judgement may correct. You'l find not
much Rhetorick in regard the Law obli-
ges me to singular terms.

Farewel:



TO THE
READER

I can neither find nor learn that ever
any but Zejeant Collis ever wrote
in this language, therefore this is the
first. I have that reverence both to the
author and his work, that I profess to
myself knowledge I have not enough
him to be translation, but what the first
is, I judge it may be best. I will find a
much better in regard to I am obli-
ged to singlet terms.

Tatewell:

LENT 1638

The Reading

Of that Learned Lawyer

John Herne, Esquire

Late of the honourable Society of

LINCOLNS INNE

Upon the STATUTE of the 23.

H. 8. Cap. 3. A Genrall Act

concerning Commissions of
SEWERS.



OUR Sovereigne Lord the King, considering the daily great damages and losses which have happened &c. as well by reason of the outrageous overflowing surges and course of the Sea, provided this Act in prevention of that and other incursions.

All Statutes of Sewers are made in aide of the ancient prerogative of the King, and how be it they are penall, as well to the Person as to the Frank-tenement of the offender, yet because *intersunt reipublice*, they shall have a large & benigne construction. This

6. R. 2.
Fish 46.
Arow.
128. 1.
Rep. Sr. H.
Constables
case.

This Prerogative hath its originall from the Law of Nations, which in truth is the originall of Monarchical Government, and the same Law gives to such Governors *Jura Regalia*, as well in respect of sea as land, as to have Sturgeons, Whale, Wreck, &c.

And as to that the statute that gives the prerogative is but declaratory of the Common Law, and in respect of these prerogatives the King ought alwayes both as well upon the sea as Land, to govern and protect, so that alwayes the King was bound *ratione dignitatis Regie*, to provide for the safeguard of his Kingdome &c.

N.B. 113.
a

and so it is recited in the ancient Commission of Sewers; Sir John Rivers Reports case of Royall piers; The principall differences between the ancient Commissions, and the Commissions grounded upon our statute, are three.

1. The first is *Enumeratio delicti*, for at the Common Law the commission did not extend but to eight particular offences, but there are added by this statute damages, by banks, streames, mills, &c. and in conclusion it is penned with these generall words, [All annoyances.]

2. *Admensuratio extenti*, for the commission upon this statute extends (not onely) to marigine parts; but to the reforming all Nufances in any part of the Realme of England, as well of Rivers navigable as not navigable, to streames &c. but alwayes with this Caution that the proceeding tends to a publique good and not to a private benefit; and for this reason there ought not to be any impediment to navigation or to a River which by industry may be made navigable, or for the overflowing of land so of rivers newly made for navigation, or drayning for a Countrey, as in *Lincolne-shire*: In these cases it concerns the generall benefit of the subject, otherwise of private waters, and so is it of the Kings high-way, which

which is onely within this statute, and not for the wayes
for private use among particular persons.

3. Aggravation of the penalty, as by this statute it
may be by abatement, fine, imprisonment, &c. so that
this statute may truly be said to be *quasi tyrannicall*, and yet
just, for it is but a tyrant opposed against tyrant (s^r)
the rage of the sea.

For explanation, of this statute there
are to be considered the principal &
the *verbo operativa* within the sta-
tute.

There are seaven words respecting
the meanes (s^r.)

Superuidendum.
Inquirendum.
Tapandum.
Assignandum.
Arrestandum.
Ordinandum.
Determinandum.

There are three conducing to
the end, (s^r.)

Defendendum.
Amovendum.
Disfranchendum.

Within the exercise of this day it shall be shewn;
who may be a good Commissioner to make a sur-
vey,

What may be a good enquiry, and what
shall be a good Taxe.

The King is supreme Justice through all the Realme,
& yet he cannot be a good Commissioner within this sta-
tute, for all the fines accrue to the King, & then he should
be judge in his own case; a blind man cannot be a Com-
missioner, for he cannot be a Surveyor, who ought to be in
the person of a commissioner, as in an action of waste the
Sheriff ought to enquire *in propria persona*, so in the case of
Redisseisin, it lyes not in ancient demesne, but onely be-

Just the Sheriff, for in this case the Sheriff is made Judge by the statute, but here the commissioners ought to be Judges upon their Survey, which is the office of the eyes, and so *MARY DUNBAR* of *Richmond*, was in commission of the peace, cited per Mr. Taylor.

In the Survey there ought to be *Justices of the Peace*. A Feme may be a commissioner, and this differs from the case of a Justice of peace upon the statute of 13. R. 2. 7. for our statute is general and does not design any person in particular. Then I do not conceive any naturall disability in a woman, as to a temporall government, though we see she is excluded a spirituall. Neither is it rare, that temporall Government hath been given to Women as well as men; *Deborah* was Judge in *Israel*, and *Semiramis* in *Babylon*, and it was adjudged in *R. R. 5. Car.* That the office of Marshall of the court well descended to a Feme, and that shee might well execute it by her Deputy &c.

Inquirors, are designed by the statute, that they shall be *honest and lawfull men*, so that a Feme cannot be an Inquiror, for she is not a man: *probi homo* excludes one convicted of conspiracy, attainted of *Perjury* or other notorious crimes. *Legalis homo* excludes *Alien*, *Killaine* or man outlawed, &c. 14. H. 4. 19. 41.

Persons to be taxed are,

1. By Whose default some damage happens.
 2. Who receives any profit adjoining.
 3. Who have damage by the Surrounder.
- A lease for yeers of land lent by the sea to B. the remainder to C. in fee, Livery is given & taken by attorney within view to the Ocean; a sea-bank within the Levell is broke, and B. & C. are taxed with other Levellers, to repair it; B. & C. have good estates, but not well taxed within this Law; A wall for defence of private ground decaying, shall not be taxed to be repaired: He who hath a ferry over the

The first is, that the wife of one who hath
a private boat, a market, or layne, or within his franchise,
for they are but a liberty, and not a profit, of the
feoffor; otherwise of a common. The second is, that it is
not within this statute, because it is not for navigation
nor for drying; but by the statute of the 5. Ed.
there is a special provision for it, and good commons is
not within this statute. The third is, that it is not
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The Feoffor.

An Infant may be a good commissioner, for there is
a special trust by this statute to the Chancellor Treasurer,
Sec. and other great persons to assign commissioners ac-
cording to their discretion; but it was objected, that
these persons cannot know men in every County, and for
that reason they often nominate upon information of o-
thers; but it may be answered, that they in matters of so
great importance, will not depend upon ordinary infor-
mation,

maison, so that in effect these persons which have the nomination, judge them sufficient; And then, they have no time to find. And therefore it differs from the cases of Dower, Legger, Sec. which have their prescribed time; also of Judicial offices, an infant generally is incapable, for offices at common Law, by presumption of the same Law an infant is incapable; otherwise is meant by office from the Generall words of the statute; for under the generall words of the statute an infant is inabled to the same office; an infant may qualifie a Chaplaine *Rep. 4. Adons* case, an infant cannot be a steward of a Mannor, but that requires more skill & experience, for the same steward ought to enter all pleas, he may be Major of a town in the civil Law *Coccusatus & pates &c.* are disabled in respect of Judicial offices, and yet in the same Chapter he allows an infant of the age of 20. years to be a competent Judge, and so admitting them disabled, yet the survey is good *arsalle*.

21. H. 4.
12. 13.

See stat. in
H. 4:
That no
enquest
shall be ta-
ken by
tythes out-
lawed
Wil. Scots
case who
pleaded
that he
was indi-
cated by per-
sons out-
lawed; and
the Judges
of the
Bench-R.
would not
proceed a-
bout in-
dictment,

2. The inquiry by men outlawed is good, the objection that he is not *Legalis Homo*; and to that I answer, that he admitting six outlawed persons disabled, yet the inquiry by the six others only, is good; because the statute designs nor any number; but I agree that as well within this statute as at Common Law, there ought to be twelve to make an inquiry; for the inquiry upon this statute is of the same consequence, being the ground of the commissioners decree, and which concerns the liberty and estates of men; also I agree an outlawed man not to be a good Juror; but *Distingueda sunt tempora*, for if it appears before oath, there he shall not be sworn, but being once admitted to his oath, there he shall be judged *Legalis Homo*, for one before oath may be thought a partial man, who after oath shall be thought indifferent; so as after

after solemn debate one was admitted to his oath in Parliament, notwithstanding outlawry.

3. The Commissioners of Sewers have a Court incident, true it is that a court by this statute is not expressly ordained. And upon this hath been objected the consequence of *Dr. Bouham's case* 8. Rep. 8. the case of the City of London which have not a court, to the commissioners upon the statute of Bankrupts, have not a court upon their commission out of Chancery, *ad audiendum & terminandum*, yet they are enabled to hold a court; but these cases depend upon their particular reasons, as if a commission out of Chancery gives a power to have a court, then the same case would depend in two courts, as well in this new court, as in Chancery, and as to the commission upon the statute of Bankrupts, and the cases of the 8. Rep. they are but ministeriall offices; and not Judiciall offices, but this statute calls the commissioners Judges of Sewers, which implicitly also gives a court of record; as also the statute appoints legall proceedings, process, Bayliffe, a clerk, a register, their power to make distresses &c. And Error cannot but be brought before these commissioners, and upon these is the authority grounded, in the 6. Rep. *Gregories case*.

4. This court is well held *die solis*, the statute of w. 1. hath been urged of my part to warrant it: but I agree Sunday not to be within this law, for the statute does not mention the particular day of Sunday, but onely any continued Feast, as in *Advent*, &c.

And within these holy times &c. *Essoyns* hath been well taken; and then it hath been objected, that here is a Judiciall act, whereas *Dies Solis* is not *Dies Juridicus*, as a Proclamation upon that day voyd, and the pleas ought to be entered, *Crastinum Quindam. Pasc.* and not *quin-*

Quin. Pasce because Sunday: So a *scire fac. die solis* not good, but the difference does not hold onely between ministeriall and judiciall acts, but between judiciall acts and civil cases, and cases of necessity for judiciall acts, *propter necessitatem* & *pro bone publica*, upon that day are good, as upon the approach of an enemy, the taking up of armes lawful; so if fire happen, the same reason of water, which is an enemy not to be repealed but in this court, and the danger as well in one case as in the other, equal & imminent; *Mich. 16 Jac.* the Hundred of Stoke was charged with a robbery, *Die solis*, & it is common experience that Coronors (*Die solis*) late upon the dead corps, which by delay would become noysome.

5. The Mill erected during the time of inundation well prostrated; for it was an impediment and hindrance of water, so that the land for a long time continued surrounded, and then it is a nulance to be prostrated: And it was lately resolved, where the Lord *Rapham* having a Mill which did not grind during the inundation, he was advised to re-edifie a new one to grind for such a time, the Mill so continued untill the time of Sir *Francis*, and after observing the prejudice and nulance (as aforesaid) the pulling it down was resolved to be good.

6. The tenant disclaims the avowry, yet well taxed; for notwithstanding the disclaimer he continues tenant, 18. H. 6. and there is a difference between a disclaimer in real 10. actions, and in avowries: for in real actions there being a demand of the tenancy upon a disclaimer, it shall be 16. H. 7. 10 judged to the demandant: and the plea of the disclaimer in the case of the Abbot is not because Mortmain which implyes mutation of possession, but in an avowry the Frank tenement is not altered by the disclaimer, but the Lord ought to have his writ of right of disclaimer, and by that shall recover the land.

(A)

The Lord after the disclaimer, cannot be taxed neither for the land or for the rent; for the tenancy continues, and yet the rent by the disclaimer is immediately lost, and as to this, there is a difference between a Cesser and a disclaimer for after Cesser, the tenant may tender his rent to save his tenancy, but after disclaimer, the Lord notwithstanding any tender shall recover the Land.

That C. is not well taxed within this Law.

1. Hee cannot bee charged in respect of the Mill, for the damage did not happen by his default; neither hath he damage by the inundation; for then he might onely grind; neither hath he profit by the reparation, because the mill is pulled downe: As to tythes, I conceive them not chargeable; for notwithstanding the generall words of *status cuiusque status &c.* yet without particular words of Ecclesiastical livings, they shall not be charged *onere seculari*, as they are excepted from toll. Otherwise of Glebe land, for that is not so sacred; but comes through temporal hands: And as to the cases of contribution for finding of armes, relieving of the poor, N.B. 128. is in respect of particular cases concerning it; so of subsidies in respect of their particular grants; so of wayes: so that without a special statute, tythes shall not be contributory to temporall charges; otherwise as to Ecclesiastical: but if they shal be contributory to shipmoney, Querie, For there was instructions taken with the writ, that the taxe upon Clergie men, should not be any prejudice as to their legall exemption from temporall charges: Also tythes are lyable to a temporall charge or taxe, after that they come into temporall hands; but
C here

Quer.
wherefore
he is not
taxed for
the land
on which
the Mill
stood.

here they continue spiritual, wherefore not well taxed;
Also the arable land doth not appear to be sur-
rounded, and then neither damage or profit.

8. The Levellers chargeable, notwithstanding particular te-
nure; yet I agree the tenure to be good, 11. H. 7. 12. 1.

Rep. *Porters case*: But here it appears the tenant to be
unable, for he hath but an acre, where all the wall is
broken; also the Diruption is *per impetum ma-
ris*

THE



The Second Day.

How a tax shall be assess by this Law.

A Man shall not be taxed according to his ability by no Law or Statute, but the 27. Eliz. Cap. 13. where by the expresse words (upon a robbery done) those of the Hundred shall be taxed according to their abilities; 12 Jac. B. R. the parishoners of Tottenham, assesse a Merchant of London a parishoner there for the repairing the Church, and the tax was according to his abilities; and notwithstanding they pretended custome, yet the Kings Bench awarded a prohibition, because the customes was against law; for if so, then perchance one or two should onely be burthened, where the benefit would be in common; against this reason, *Quod omnes tangit ab omnibus supportari debet*, shall be expounded according to the quality, as in the statute of *Quia repature, &c.* for the rate ought not to be Arithmetically, but Geometrically. And note the intencion of the Statute is not *magna* or *parva* but *media*.

He cannot be double charged, as a Copy-holder can, nor be taxed for his Copy-hold, and the Lord for his Frank-tenement and if there be a distress upon the Lord

trespass lies against the Officer *non obstante*, the colour of this Commission.

Lord and Commons may be both charged; for they have several profits: the tenant may be charged for the land, and the Lord for the rent; so the Grantee of a rent charge, or a Rent seck, but the commissioners are not bound to examine the particular estates or incumbrances; but they may tax the land severally; and upon complaint of the tenant he shall be received by equitie, and the tax shall be devided; for otherwise the tenant might be charged above the value of the profits of the land by him received.

Differences of repair; They are annual and accidental, ordinary and extraordinary: A Reversioner having a rent shall be taxed for the rent, as well to ordinary as extraordinary repairs; and if he have no rent, yet he shall contribute to extraordinary; but if it be a remainder or a reversion upon a lease for years onely; there shall be a contribution to ordinary repairs.

The Case.

After Survey and presentment made, that the port of *A.* was greivously in decay, and not repairable but upon unusuall charge; and that *B.* for cause of frontage, and *C.* for cause of a passage, and the Village of *A.* by custom have used joyntly to repair it, and that *D.* a Merchant of *London* trading there, had promised to one of the commissioners, that if they duely executed their commission, he would stand charged to pay 100. pounds towards the repair: The commissioners thereupon tax *B.* and *C.* and the Village of *A.* and four other Villages in the High lands adjoining, severally to repair the part,

and

and D. the 100. pounds and make warrants to the Officers to levy the sums by distresses and sale without allowance of replevins, where by law it might be denied. The Officers distresse D in London; and all the Vills pay but B. and C. Being distress'd bring replevins, which the Officers refuse to allow, and they sell the distress.

All these taxes good and well levied within this

1. First the Upland-towns adjoining, are well taxed by this Law; for, first the inhabitants are adjoining, and then they may suffer damage by decay of the Port, or they may receive benefit by the repair, as well in trading by import, and export in time of peace, as in time of war opportunity for exporting of souldiers. Then these Inhabitants have *Salvationem Defensionem & Commodum*; otherwise it is of towns remote; which (*non obstante*) damage or profit received, shall not be taxed because they are not adjoining. 31. Ast. Pla. 10.

2. Town-ship may be taxed generally, against the sale of the *Isle of Ely*, *Rep. 10.* For although the first words of the statute seem to direct a particular tax to be assess'd upon every possessor of land, &c. yet the clause concludes generally, *according to the directions, &c.* So that it may be convenient for the Commissioners to assess a sum in gross upon a Village; and after sub-divide the same; *Magna Charta 15.* A tax levied in the same manner, and upon the Statute of *Winchester*; an amercement of a town, good. 37. 38.

Dr. & Stu-
dent 74.

4. Jact. A decree from the Council Table with advice of
all Judges, that such a tax is good.

a Rep.
Wise man's
case.

34. D. Trading there, and promising, &c. is well tax-
ed; true it is that loss in trading is sustained by inunda-
tion: yet I agree, that loss only does not suffice, unless he
be an inhabitant also, but I rely upon his promise, which
as well makes a man chargeable, as a tenure or prescrip-
tion; and it is a legall consideration to support that pro-
mise. The objection, that to the King it is no good con-
sideration, because he is bound *ex officio*; To here, for the
good execution of commissioners: First the case obje-
cted may well be doubted; but admitting it good law, yet
the cases differ; For the King is bound without election,
so no consideration; otherwise of a commissioner, who
may refuse to be a Governor. But admitting no good con-
sideration in law, yet he is bound in conscience: And as
to that difference between *nudum*, & *datum* simply, and
promise to good uses, or *pro bono publice*, the commis-
sioners may make it compulsory, for they have a court
of equity; and may as well charge as receive by e-
quity.

A distress of D. in London, or in any other town; good
within this law: as to the lands or goods to be taxed,
they are limited to their Jurisdiction; But upon a re-
fusal of payment, a distress in any part of the Realm, is
a lawfull distress; of common right it is upon the land,
or where there is a charge *ratione tenure*, and upon pre-
sentment before the commissioners *ratione tenure*; awar-
ded to Officers, it is ministeriall only, and shall not
be taken but upon the land; but if so judiciall a distress be
awarded there in any part of the Realm (*non absente*)
the tenure shall be good.

B. and

B. and C. are well taxed, and the Tax well levied by sale, without allowing the *Replevin*; in respect of the Frontage or Passage they might have damage or profit, (for it is needed of a private passage) and then the tax without question is good, and the sale without the *Replevin*, for the levy is not satisfied by the distress of the Officers, because they ought to collect and lay out; but they cannot lay out without sale. And although a Distress is not generally saleable in so many dayes, yet being here in this case where a *Replevin* does not lie at common Law, it shall be good: 3 H. 7. 4. A Distress for an amercement in a Leet may be sold. And admitting a *Replevin* did lie, yet being a Distress made by a superior Court, the sheriff cannot make a *replevin*: Otherwise of the C. C. Dyer 67. 3 Rep. Rooks case.

22 Aff. 70.

7 H. 4. 27.

21 H. 7. 40.

11 H. 4. 6.

THE



The third Day.

What shall be a lawful Arrest, Ordinances, Denovo, where good; and what Cases are determinable by the Commissioners.

IN these particulars the Power of these Commissioners extend further then all other statutes; for the Authority is not bounded by prescribed rules, but it is left to their discretion; and yet absolute power given them to compel obedience to their Ordinances: Wisdom is here coupled with Discretion, and also the addition [*Good*] according to their good discretion and wisdom; discretion is *Generalis specialis aut legalis*: Every wise man dispatches every business with a general discretion, and yet that discretion submits to others; for *Nemini oportet esse sapientiori legibus*.

The touchstone of their proceedings within this statute, ought to be *Discretio specialis & legalis*, and between
 34H.6.24 sense and discretion to know what is just, and *ubicesat lex*,
 19H.6.37 to have recourse to reason, and that also but in cases of necessity

necessity, *potestas ordinandi*, gives power to erect new defences: they have power to arrest the body of a man; and in many cases where he may be fined, he may be imprisoned.

Opposition to the legal Ordinances of the Court, is a rebellion, and punishable by fine within this Law. An Officer for his neglect finable. Otherwise of an Officer not sworn. One that makes payment at the time appointed, is not finable, but to be amerced. One for non-feasance amerced onely: Otherwise for misfeasance. The case for which a Fine is imposed by Act of the court, not traversable; Otherwise it is of a Fine upon a presentment of the Jury; but all Fines ought to be reasonable.

10 H. 6. 6.
8 Rep.
Gregorius
case.

Fines may be assent onely in *Plena curia*; for out of court they are not Judges of Record.

Fines are not leviable by the Commissioners, but shall be estreated into the Exchequer.

11 Rep.
Godfrey
case.

Otherwise of Justices of the peace.

And the difference arises upon the several pennings of the statutes.

Commissioners have power to impose perpetual charge, (β.) an annual charge for keeping in repair, and to sell the land upon refusal of payment; the Commissioners may not onely decree right, but do right; as well repeal, as expound ancient laws.

The Case:

The Village of *A* upon a coast of the sea (which had an ancient Bridge upon the river, time out of mind of man, &c: utterly decayed) is incorporated by the king that now is, and therefore hath a grant of Pontage; B.c.

D

rects

rects purpresture, and inhaunces a Meare within the river by force, which by former order was destroyed: The Commissioners upon survey and presentment, upon their discretions decree a new bank to resist the Meare, and fortifie the bridge, and the Levellers to make it; the county to re-edifie the bridge, the Village to keep it in repair: *B* is arrested and imprisoned, and *C* to pay a hundred marks.

The POINTS.

1. All these acts are justifiable by the commissioners within this Law: Grant of Pontage good. It hath been objected, that the King may grant a thing tending to charge people: and *Davis's Reports*, fol. 15. it is express, that Pontage cannot be granted, but it lies onely in prescription, as of other things lying in grant onely, and not in prescription; but cleerly, Pontage as well lies in grant, as in prescription: But true it is, that Pontage for a bridge before built, is void; for there it is but a charge to the subject; but Pontage for a bridge to be erected new, is warrantable; for there it is, *Quid pro quo*: Also admitting the ancient bridge, then Pontage is incident, unless prescription lie under; as the case between *Heedy* and *Wheeler*, it is resolved, that toll is incident to an ancient faire, unless prescription to the contrary: So of Pontage to a bridge &c.

Rep. 1. A.
1011. woods
case. Plow.
426. Rep. 5
51. Rep. 11.
73.

38 Eliz.
B.R.
Rot. 903.

2 Commissioners may erect a new.

The objection, That an *ad quod damnum* ought to issue first; but here is a great circumspection; for it is not a trust to a single person onely, as *Escheator*, but after survey of commissioners oaths. Another objection, That the statute of *H. 6.* gives this power by *Expresse words*:

words: so that without exprefs words, power is not granted. But I conceive, although the statute of *H. 6* be temporary, yet it continues, and our statute hath some coherence with the words of the statute of *H. 6* and upon the same reason was a solemn Decree grounded at the Council table, That commissioners might erect *de novo*; and the difference was there taken between a statute expired, and a statute repealed; for where a statute is repealed, there an inconvenience appears, and a repeal is made in disallowance; but where a statute expires onely, there it hath once an allowance, and no check in disallowance.

3 The county is well charged to re-edifie the bridge, and the village well charged to repair it: the question is grounded upon 22 *H. 8. of Bridges*, by which it is enacted, that every village incorporate shal repair bridges of the same village, and the others are left to the county charge, unless there be a particular tenure or prescription, then there cannot be prescription, because the decay is *before time of memory*, &c: neither is the village bound to repair it, because that the corporation was made after the decay, also it was a village in the county charged at the time of the statute; for it is corporate in the time of the King also: although it be a village incorporate, yet not being a county-town, it continues within the county at large, but after erection, the charge of the village to repair it is good, for the village hath Pontage: *Et qui sentit enim debet sentire commodum.*

B: was well arrested and imprisoned for the purpresture; for purpresture may be as well in water as in the high-way, and this without force, but amerciable: but puppresture or anuſance with force fine-

*Kelw. 141.
7 H. 4. 33.
19 H. 6. 8.
33 E. 3. 8.
Da. Rep. 6.
De Rey.*

able, and then if finable, imprisonment follows of consequence.

5 The fine of C. to an hundred marks, is reasonable: and I shall not help my self by aggravating of the offence with contempt, being to redifie after pulling down by Decree: but I hold, that here he can; not be fined to a greater or lesser sum, and the words of the statute are exprefs, *scil. Statute 1 Hen. 4: cap. 12.*

THE



The fourth Day,

*What cases are to be determined within
this Law.*

IF a tax be imposed upon *A*: and the goods of *B*. are distrained for it, *B*: shall have an action of trespass in the court of Sewers.

Officers and servants, as Carpenters and Masons, &c. employed by the commissioners, shall recover their wages of the commissioners in this court, because the original cause arises by this court: Otherwise where it arises out of this court, as the case of *Vaux* and *Gibbons*, which was referred to the Council-table: but where a thing originally belongs to the court of Sewers, that shall warrant all the proceedings also, for the acc¹ R. 3. 4. cessary follows his principal.

Where a township is taxed with a sum in gross, and a man distrains for it, he shall have process out of this court for assessing of the sum after sale of the land for non-

non-payment, where the Officers by Decrees of this court, takes trees upon the land of one man, and digs a trench upon the land of another man, both shall recover damages for the land, and also for the trees, against the levellers in this court: But if *A*: was chargeable by this law, and *B* disseises him, yet *B*. shall have no remedy by this law.

A presentment in a Leet or Turn not traversable unless they concern the frank-tenement, and then I conceive it ought to be removed into the Kings bench; and the reason why personal torts are not traversable, is I conceive, because *de minimis non curat lex*, and therefore no process to compel him to answer in this court.

ii Rep. Bays
case.

8 Rep Bon-
bams case.

No traverse against a return of a sheriff, or a Major and commonalty, but presentments before Justices of the peace are traversable: So a presentment before Justices of Oyer and Terminer, *Stat. 183. 83: 30 Aff. 57: 37 Aff. part: 45: E. 3: 26. Plowd. 397. Charter of Rumney Marsh, fol. 23, 24 and Godfrey was presented for not repairing, and his traverse was admitted to be good, for otherwise the words of the statute were in vain: All traverses framed according to Law, shall be allow'd in this court.*

The Case:

Upon survey against *A* upon a presentment against *B* & *C* upon decree for sale against *D* and against the father of *E* *A* tenders his traverse, *B* prescribes in *non reparando*, *C* pleads that he and *F* ought to join in repairing, *D* pleads that he was within age at the time of the decree, and *E* that he is son and heir of the donee, against whom the decree was made:

All

All these traverses and pleas are disallowed by the Justices of Sewers, and well within this law.

The survey of the Commissioners not traversable. *M. Holborn*

A survey is supposed to be by the court; and so it is a record. But I doubt if the commissioners may make a record to charge the subject, they may by the statute come and prostrate; but they are restrained by the other words for charging: If they be Judges of the default, yet they are not Judges upon what the default lies, for the statute says it shall be by enquiry: Also it is not possible they should upon coming determine upon any cases, for they cannot view if the will was made before the time of E. M. and then they ought not to prostrate it; but if they can make a record, that is not traversable, for it is made by them as Judges; for commissioners of Sewers are a court of *Oyer and Terminer*; and what a man does as Judge, that is not traversable, for it is presumed to be just. ^{14 H. 3.}
^{7 H. 4.}

If Justices of Peace view the high-ways, and make entries of it, it is equivalent to a presentment, and there no traverse: So of surveys of the commissioners who are made Judges: But a presentment of a Jury without question is traversable. ^{1 Mar. Dyot}
^{Vernons}
^{case.}
^{19 Aff. 6.}
^{1 H. 4.}

The commission of Sewers is part of the general power of the general commission of *Oyer and Terminer*; but the question is, If the prescription of a *non reperiendo*, be good, it is void at common Law, for it is against reason: but as before, *Quod omnes tangit ab omnibus debet supportari*, a Clergy man may prescribe in *non decimando*, but a Layman cannot, because he was not capable of taking of tythes; and of a clergy man it was reason, because it might be that he was discharged anciently by contract, but in our case the King has interest, and

^{Rep. 2.}
^{Marquels}
^{Wincheff.}
^{case.}

and therefore it belongs to him to discharge, & prescription is not good against him; but if it were good at common law, yet this statute takes it away, because the words are general, (*Everyman, rich or poor, &c.*) For Wreck there may be a prescription, *Non obstante*, the statute of prerogative: In *London* there is a custom, and they prescribe, That he that serves an apprenticeship to one trade, may set up any, 5 *Eliz.* 5. *Now* said, That that statute being general in the negative, takes away such customs. But the same was over all the realm.

Rumey
Marbleb.
fol. 13. 39.

C. pleads that he and F. ought to join in the repair: No good plea; For among joynt-tenants, every one is charged with the repair of the whole, for there is to be no division amongst them; for when one possesses all, it would be inconvenient and difficult to find all the Joynt-tenants: True it is, for avoiding of damages joynt-tenancy is a good plea, for there he cannot help himself; but in our case the commissioners have a court of equity, and have power to relieve and make distribution. There might have been the Writ *Dereparatione faciend. de overand. pro rata portion*; so the statute of *Marleborough* for suit, to have the other tenants contribute; So upon 27 *Eliz.* 13. upon Hue and cry contribution.

N.B. 234.
235

3 Infancy at the time of the Decree, no good plea; but the sale shall bind the Infant *in perpetuum*.

Littleton sayes, that in such a case Latches shall not prejudice the Infant. Now where the benefit of the *Common-wealth* is concerned, and the words of the statute are general, there the infant is to be bound, for the *Common-wealth* is the greater favourite of the Law, statute 4 *H. 7. of Fines that shall bind Infants*; for there is no expresse saving for them: So the statute of

Limi-

Limitations, 19 H. 8. but there is a difference where the statute charges the possessions, of the Infant, there he shall be bound, but the person of the Infant is more favoured. But though they may not during his non-age, yet at his full age they shall be charged for the default of his infancy; so of the Statute of waste; but the person of the infant shall be excused. As the statute of *Westm.* 2. enacted, that he that pleaded a record, and failed of it, should be imprisoned, yet an infant shall not. Now in our case where the statute is made *pro bono publico*, and the infants person not touched by the Decree, neither is there any prejudice to the infant because the commissioners are Judges intrusted by the Law to do equity. Also so it is of a Feme Covert, so I conceive for the reasons aforesaid that he is bound by this statute.

5. The heir of a gift in tale, is chargeable upon a Decree against his ancestor; but that ought to be supposed upon a complaint to be relieved in equity, that it cannot be a plea against the decree is determined: The question is grounded upon the statute *De donis conditionalibus*, which sayes, that neither *Fadum*, nor *Feoffment* of the Donee shall prejudice his issue. Now there are many statutes that do not extend to prejudice these Estates, the statute of 16 R. 2. of forfeiture of all lands upon Premunire, extends not to tails, because the general words of the statute are merely penal; but statutes that are for the publike good, if they be general, extend to it, as 4 H. 7. of Fines, 3 Rep. 8. and the Law takes it, that a demise of a tenant in tail, should bind the issue, until the 34 H. 8. and upon the 42 Eliz. of charitable uses, a conveyance by Donee shall bind the issue in tail, because it is beneficial to him;

7 E. 3. age 68.

Plow 359.

419.

21 E. age

14.

4 H. 7. 11.

Fitz. aff.

443. Im-

prison. 17.

14 H. 18.

11.

32 H. 8. 28

him, but the 28th 11th 8th for forfeiture for treason shall not bind the Estate tail, because its penal. Now our statute being (by Estate) if it should not reach to Estates tail, the words would operate nothing, and it may be all the Lands chargeable may be in tail at the same time, and then there would be no lands chargeable if the statute did not extend to tails, and so be sold; yet I conceive there be some lands that cannot be sold by this law, as of a corporation that makes default, their lands shall be sold within this law, if it be such a corporation which may perpetually charge their successors otherwise of a corporation that cannot bind themselves, as a *Prebend, Parson, Dean, and Chapter, and Bishop, &c.* For the statute of 13 Eliz. says, that no act or conveyance by them to be made or suffered, shall bind their successors. But the general words of our statute makes the successors chargeable. And although the statute *de Donis, &c.* protects the issue, yet they may be well charged within this law.

The

The Reader.

If *A.* by survey being found faulty for non-fealcance, he may traverse it by this law; this law hath two surveyors, the commissioners themselves, who may come and survey;

2 Officers, as assistants and Jurors. If the Jury make a presentment that *J.S.* ought to repair by reason of his tenure, the presentment is void; for the jury ought not to enquire of that; but if they present that *J.S.* hath not repaired as he was charged to do, that's good; and in this case to the presentment of the Jury the party may tender his traverse, because the Jurors are onely assistants to the Court for occasion, but not Judges; but the survey of the commissioners themselves shall not be traversable, because it is the act of the court, and it is done as Judge, and not by special authority, as commissioners of bankrupts. And if a Justice of peace survey the force, and makes a record of it, that is not traversable, because 'tis done as Judge of it.

Prescription for *non-reparando*, is good; for the words of the ancient commission are *Cususcunq; status conditionis, &c.* so the words of the statute, *Every man which shall reap benefit*, although a prescription *pro modo* is good; and according to the special matter his prescription may be good, as if *B.* had pleaded that his land had lain between the sea and the sea-bank, & prescribes for discharge of his land; there the prescription is good. Otherwise of a prescription generally, *Joynnt-tenancy*, is not a good plea; for reparation being a publike

work, and of necessity it shall not be pleaded; but all the land shall be charged in gross.

4 *Rep. Co-nyers case.* Infancy no good plea for the manner, because it is after the Decree, which is the final judgement, and he is put to his bill of review before the commissioners.

5 *44 E. 3. 22* That the issue shall be bound as aforesaid. A rent granted by tenant in tail for release of him who had the right, this shall bind the heir because 'tis for his benefit. And in our statute there is the word (*Heir*) which would be void unless it included the Estates tail. Also this plea is void for the manner, *Ratione predicta*, of Infancy.



The Fifth Day.

Was upon the power of the Commissioners to determine, and what Lands, and for what causes they may be sold, what persons liable to be charged.

LANDS to be charged within the decree, ought to be within the bounds of the Commissioners; but there is a difference between locality for a decree, & for a distress; for the distress may be in any part of the Realm, *Non compos mentis*, Infants, &c. are bound by this statute; so of a Parson, Prebend, &c. and other corporations; but as to their successors, the corporation within the statute of 12 Eliz. is out of this statute; for they cannot by any act to be done or suffered, prejudice their successors.

The Case.

A. seised of lands left by the sea, *B.* and *C.* tenants in common of other lands, and *D.* copy-holder of another acre; *A.* is assest 2 d. *B.* & *C.* 20 s. for their a-

acre, and D. to 20 s. for his acre; A. B. and D refuse payment, and the commissioners decree the sale of the acre of A and the moiety of the acre of C and D.

The POINTS.

1. The Decree for none of these sales is good.

Lands left by the sea is not within this commission; for there is a difference between lands gain'd from the sea, and land left by the sea; for the lands absolutely gained, may be more beneficial, and it is within the level; but this land left, is between the sea, and the sea-banks, so that there can be no benefit by the reparation.

2. The sale of the copyhold land is not good, for then the copyhold estate should be altered without the privity of the Lord: Otherwise of a tax.

3. Tenants in common being taxed, and refuse, the sale of the moiety is not good, for the tax is joint, and shall not double, as upon a grant of a rent; and then the tax being intire, (and no partition of the Estate) a division by sale of the moiety, is not good and warrantable, for a tenant in common cannot prejudice his companion as to his land; and upon every sale Commissioners ought to take notice of Estates. Otherwise upon a tax.

The sixth day nothing was done, but repetition of the former days exercises.

F I N I S.

